

Jaohara (Migration) [2018] AATA 4541 (10 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Ali Jaohara

CASE NUMBER: 1713346

DIBP REFERENCE(S): BCC2015/3890464

MEMBER: David Barker

DATE: 10 September 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations

Statement made on 10 September 2018 at 9:19am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – genuine relationship – met through mutual family members – socialise with family – joint finances – sponsor manages most finances – details bank records provided – bought property together – share household tasks – stable and supportive relationship – decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 9 June 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 15 December 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because they were not satisfied the parties were in a genuine spousal relationship.
4. The applicant appeared before the Tribunal on 6 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

6. BACKGROUND

7. The applicant is national of the United States of America and is 31 years old. He has been previously married and has one child from that union, a daughter, Yara, aged seven years who resides with his previous wife in the United States of America. The applicant first travelled to Australia In April 2015 on a Working Holiday visa.
8. The sponsor was born in Australia and is 30 years old.
9. In the decision record, a copy of which the applicant provided to the Tribunal, the delegate stated they were satisfied the parties were legally married, but noted they had not provided any other evidence of mutual commitment, obligation, companionship, emotional support and long term planning.
10. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following, written statements from the applicant, utility bills, documents pertaining to the parties identities, financial records, rental tenancy agreement, travel records, photographs and witness support statements.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the applicant and her sponsoring partner were in a genuine spousal or de facto relationship at the time of application and at the time of this decision.
12. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files and oral evidence provided by the applicant and sponsor at the hearing. The Tribunal has the benefit of considerably more evidence than was available to the Department at the time of the delegate's decision.

13. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living circumstances was consistent and credible. Their oral evidence during the hearing was also consistent with the extensive documentary evidence provide with the review application. The Tribunal found the parties to be credible witnesses who gave their evidence in a calm, rational manner without embellishment and the Tribunal was satisfied weight could be accorded to the parties' claims about the nature of their relationship.

Whether the parties are in a spouse or de facto relationship

14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The Tribunal has reviewed a Commonwealth of Australia marriage certificate which states the applicant and sponsor were married in Kingsgrove, NSW in November 2015.
17. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

18. *Inception and development of the relationship*
19. The applicant and sponsor gave evidence they met not long after the applicant came to Australia in April 2015. They gave consistent evidence that the sponsor's sister is married to the applicant's cousin. They indicated they met when they both went out socialising with the applicant's cousin, the sponsor's sister and a group of the sponsor's friends. They claim they continued to socialise with each other as part of this larger group of friends and relatives of the sponsor and then started dating each other. They gave consistent evidence as to the development of their connection with each other and their discussions as to mutual interests, life stages, goals and related matters. The applicant gave evidence that both he and the sponsor are a similar age and no longer young adults. He said they both rationally discussed making a commitment to a relationship and a future life together and they both gave evidence as to their cultural circumstances, whereby establishing a household together, before marriage, was not an option open to them. They both indicated this was why they progressed to marriage fairly quickly.

20. The description of the inception and development of the parties' relationship was in the view of the Tribunal both plausible and reasonable.

21. Financial aspects of the relationship

22. The oral evidence provided by the parties during the hearing is consistent with the information in the written submissions provided with the review application. The Tribunal has reviewed the bank statements, utility accounts and other financial records which were provided with the review application and finds they corroborate the parties' oral evidence with respect to the financial aspects of their relationship.
23. The parties gave consistent evidence they pool their income and jointly meet their financial commitments, both large, such as the home loan on their recently purchased apartment and small, namely groceries and other regular living expenses. They both said the applicant's wages, from his job delivering construction materials, is deposited into the parties' joint account with National Australia Bank (NAB). He said that the sponsor maintains her own NAB account and that they both have access to either of these accounts. He said funds tend to be transferred into the sponsor's account, from where expenses can be paid over the internet or mobile phone banking apps. He said the sponsor tends to do manage most of the regular day to day transactions in this manner and that this is why he provided fairly extensive records of her bank account with the review application.
24. The sponsor gave evidence she has an investment property in her own name. They both gave evidence they have jointly purchased a residential property in Campsie, where they are currently living together. The mortgage for this property is in both of their names, the home loan payments are made from the sponsor's NAB account and that funds are transferred into this account from their joint account for this purpose. The applicant said some regular expenses such as utility bills and groceries are made from their joint account.
25. The applicant submitted that the lack of evidence demonstrating the merged nature of his and the sponsor's finances around the time of application in late 2015 reflected the fact that they were at that stage newly married and there was not sufficient time for their finances to reflect their partnered status. The Tribunal was satisfied as to the plausible nature of this claim.
26. The Tribunal has considered all of the evidence that is currently available and is satisfied that the financial aspects of the parties' relationship are consistent with those of a young couple in a genuine and continuing relationship.

27. Nature of the household

28. The Tribunal accepts on the basis of the evidence before it that the parties have lived together or not separately apart on a permanent basis, since their marriage in November 2015. They initially resided together in an apartment they rented in Croydon Park, NSW and in early 2018 moved to a property in Campsie, NSW which they have jointly purchased. The Tribunal notes some of the correspondence sent to the parties is addressed to a Kingsgrove, NSW address. The Tribunal accepts this is the address of the sponsor's family home and that she and the applicant have for some purposes used this as a postal address. The Tribunal sees nothing untoward with this arrangement.
29. The parties gave consistent evidence they both attend to things that need to be done around their home, such as shopping, cooking and house cleaning, with the applicant having more involvement with cooking and the sponsor with shopping and cleaning. The Tribunal was satisfied the parties gave consistent descriptions of their household arrangements, which were not rehearsed or disingenuous.

30. The Tribunal accepts the parties share household tasks and considers their evidence of the nature of their household arrangements provides significant weight in support of a finding of a genuine and continuing relationship.

31. *Social aspects of the relationship*

32. On the basis of the oral evidence of the parties and the available witness statements, the Tribunal finds that the relationship between the applicant and her sponsor is recognised and supported by the parties' family and friends.
33. The Tribunal has reviewed the photographs provided with the review application. During the hearing the applicant was able to put in context a representative sample of these photographs, when asked to do so by the Tribunal. The Tribunal is satisfied the photographic evidence show the parties together and in the company of family and friends at various points in their relationship since 2015. The Tribunal notes these photographs show the parties in company with the applicant's daughter in the United States of America, with his extended family in Lebanon and with the sponsor's family in Australia.
34. The applicant and sponsor gave very consistent evidence as to the pattern of their usual weekly routine in Sydney, consisting primarily of work, time together, going out with friends and younger relatives on Saturday evenings and Sunday gatherings at the sponsor's family home. The Tribunal considers this aspect of the parties' evidence to reflect their ease in each other's company and the cultural patterns which are emblematic of their shared cultural heritage.
35. Based on the available evidence the Tribunal is satisfied that the applicant and his sponsor jointly plan and undertake social activities and represent themselves to other people as being in a committed, marital relationship. The Tribunal is also satisfied that in the opinion of the sponsor's family and friends, the parties are in a genuine relationship.

36. *Nature of the persons' commitment to each other*

37. The Tribunal finds that the applicant and her sponsor have been in a committed relationship since November 2015. The Tribunal accepts the parties have a commitment to supporting each other in relation to their career aspirations, their sense of responsibility to their family of origin and their plans to at a suitable point raise their own family.
38. The Tribunal is satisfied the parties see their relationship as stable, mutually supportive and long-term. The Tribunal considers the parties' evidence with regard to their commitment to each other to be plausible, persuasive and sincere.
39. The extent to which the parties support each other and are committed to the welfare of each other provides significant weight in support of a finding that they are in a genuine and continuing spousal relationship.

40. *Conclusions on spouse criteria*

41. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and her sponsor married in November 2015 and they are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others, and that they live together, or not separately and apart, on a permanent basis, both at the time of application, and at the time of decision.
42. The Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. The applicant's sponsor has turned 18

years of age and therefore satisfies the criteria in cl.820.211(2)(c). Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.

43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

44. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.20.211(2)(a) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).